STATE OF MICHIGAN

COURT OF APPEALS

LYNN WHITE,

Plaintiff-Appellant,

V

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant-Appellee,

and

HUGH COX and JOAN NEWTON YUKINS,

Defendants.

UNPUBLISHED
March 1, 2005

No. 250250
Wayne Circuit Court
LC No. 02-220769-NZ

Before: Murphy, P.J. and White and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendant Michigan Department of Corrections (MDOC) on her discrimination and retaliation claims brought pursuant to under the Civil Rights Act (CRA), MCL 37.2101 *et seq*. We affirm. This case is being decided without oral argument under MCR 7.214(E).

I. Basic Facts and Procedural History

Plaintiff, an African-American woman, was first hired by defendant as a corrections officer in 1986. In 1994, she transferred to defendant's Scott Regional Correctional Facility (SCF) where she worked as a Resident Unit Officer (RUO). From 1995 through 1998, plaintiff was disciplined on five separate occasions for work rule violations.[1] In 1999, she was terminated

[1] According to defendant's Progressive Penalty Grid, if an employee is subject to five work rule violations when each violation occurs within less that two years of any other violation and that no single work violation warrants discharge standing alone, the employee is subject to termination.

from her employment. At the time of her discharge, disciplinary action for a sixth work rule violation was pending and she was on her second consecutive "interim service rating" for failure to meet defendant's "time and attendance" performance standards.

Plaintiff filed her complaint against defendant alleging racial discrimination and retaliation. With respect to her claim of racial discrimination, she alleged that similarly situated Caucasian employees, Virginia Clark and Lynn Abel, were not discharged for the same or similar conduct and that further, her termination was in retaliation for her union activities, as well as her testimony against defendant in prior racial discrimination litigation involving another MDOC employee.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). It argued that neither Clark or Abel had the same extensive disciplinary record as plaintiff, nor had either failed to satisfactorily complete a second consecutive "interim service rating." Moreover, it argued that plaintiff failed to establish a temporal connection between her participating in protected activities and her termination. In an opinion letter the trial court granted defendant summary disposition. The trial court stated that plaintiff failed to establish a prima facie case of racial discrimination because defendant "identified significant differences in the offenses charged against the [C]aucasian females that account for the fact that their offenses did not result in termination of employment". With regard to plaintiff's retaliation claim, the trial court stated that there was "no showing of a causal relationship between plaintiff's protected activities and her discharge".

II. Standard of Review

We review de novo a trial court's grant of summary disposition. *Peden v Detroit*, 470 Mich 195, 200-201; 680 NW2d 857 (2004). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in the light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Summary disposition is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

III. Analysis

Plaintiff first argues that the trial court erred by granting defendant's motion for summary disposition on her race discrimination claim because she established a prima facie case of disparate treatment race discrimination in light of defendant's treatment of two white employees. We disagree. To establish a prima facie case of disparate treatment race discrimination, a plaintiff must show that for the same or similar conduct she was treated differently than a person of a different race. *Betty v Brooks & Perkins*, 446 Mich 270, 281; 521 NW2d 518 (1994). To show that an employee was similarly situated, the plaintiff must prove that "'all of the relevant aspects' of [her] employment situation were 'nearly identical' to those of [another employee's] employment situation." *Town v Michigan Bell Telephone Co*, 455 Mich 688, 700; 568 NW2d 64 (1997). Similarly situated typically means of the same rank and employment history. *Id.* at 700.

After review of the record, we conclude that the trial court did not err in granting summary disposition as neither Clark nor Abel were similarly situated to plaintiff. Although plaintiff, Clark and Abel were of the same rank, their employment histories were significantly different. Clark was not serving, nor had she ever been placed on a second consecutive "interim service rating." In addition, Clark had only two prior work rule disciplinary actions taken against her in 1996 and 1998. Although Clark continued to have time and attendance problems after her demotion, defendant presented uncontradicted evidence in an affidavit from its personnel manager at the SCF that Clark was allowed to periodically arrive to work late based on documented medical conditions. As to Abel, defendant presented uncontradicted evidence in an affidavit from a person who supervised both Abel and plaintiff that Abel's time and attendance substantially improved during her second "interim service rating" which resulted in her being returned to "satisfactory status."[2] In addition, Abel only had one prior disciplinary work rule violation.

In contrast to Clark and Abel, plaintiff's performance during her second interim rating was unsatisfactory in that she was tardy on twenty occasions. In addition, disciplinary action for a sixth work rule violation was pending at the time of plaintiff's termination. Accordingly, the employment history and conduct underlying plaintiff's discharge was not same or similar to the comparison employees. Thus, plaintiff has not established that the trial court erred by granting summary disposition to defendant on her race discrimination claim.

Plaintiff also argues that the trial court erred by granting summary disposition in favor of defendant on her retaliation discrimination claim. We disagree. "Something more than a temporal connection between protected conduct and an adverse employment action is required to show causation where discrimination-based retaliation is claimed." *West v General Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003). Plaintiff indicates that she testified in an employment discrimination case brought by another person against defendant, filed an internal harassment complaint against a supervisor, and was involved with representing other employees as a union representative. But, other than discussing the temporal connection between the time of this allegedly protected activity and her termination, plaintiff has not presented evidence to reasonably support a finding of retaliation. In *West*, our Supreme Court concluded there was inadequate evidence of retaliation discrimination in circumstances in which the plaintiff did not show "any reaction or conduct on the part of his supervisors that reasonably suggests that they were upset" by the activity that was allegedly the reason for retaliation in that case. *Id*. at 187. Further, defendant's rationale for plaintiff's termination, i.e., time and attendance problems, appears on its face to be a legitimate area of concern for an employer. Accordingly, because plaintiff's retaliation discrimination case is based merely on allegations of temporal proximity between her alleged protected activity and adverse employment action, she failed to present adequate evidence to establish a genuine issue of material fact on her retaliation discrimination claim. The trial court properly granted defendant's motion for summary disposition.

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[2] Contrary to plaintiff's suggestion in her brief, there is no evidence that Abel was placed on a third "interim service rating" period.

Affirmed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Kirsten Frank Kelly